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No. 08-479

IN THE
SUPREME COURT OF THE UNITED STATES

SAFFORD UNIFIED SCHOOL DISTRICT #1; KERRY WILSON, HUSBAND; JANE DOE WILSON, WIFE; HELEN ROMERO, WIFE; JOHN DOE ROMERO, HUSBAND; PEGGY SCHWALLIER, WIFE; JOHN DOE SCHWALLIER, HUSBAND,
Petitioners,

v.

APRIL REDDING, LEGAL GUARDIAN OF MINOR CHILD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawai'i State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA represents over 95,000 school board members who govern over 14,000 local school districts serving about 49.8 million students.

The American Association of School Administrators ("AASA") is the professional organization for more than 13,000 local school system leaders. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children.

Amici have a strong interest in ensuring that school leaders have the ability to respond to student drug abuse in an effective manner through educational efforts and other appropriate interventions that may include student searches. *Amici* believe that school officials should be afforded legal clarity and appropriate deference when making

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[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

on-the-spot decisions that require the balancing of student privacy with the need to ensure a safe and orderly learning environment for all students. The Ninth Circuit's ruling sharply limits the ability of school leaders to meet this responsibility without risk of personal liability.

SUMMARY OF ARGUMENT

Twenty-four years ago this Court, in *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985), rejected efforts to impose a warrant requirement and probable cause standard on searches by public educators. The Court recognized that the need for efficient school administration undertaken to preserve a safe school environment and to protect students from serious health risks required a more flexible "reasonable suspicion" standard to evaluate the constitutionality of school searches. While this Court has reviewed other student search cases since *T.L.O.*, namely *Board of Education of Independent School District No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002) and *Vernonia School District, 47J v. Acton*, 515 U.S. 646 (1995), those cases did not involve searches based on individualized suspicion of a specific student.

Contradiction in lower court precedent applying *T.L.O.* demonstrates the need to decide this case on its merits and clarify the application of *T.L.O.* to searches that extend beyond the facts of that case. Otherwise, lower courts likely will continue to confuse matters through the development of a jurisprudence that frustrates the ability of educators to effectively address a myriad of

student behaviors that create potential harm for our nation's youth. Further, in light of its recent decision in *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009), the Court is in the unique position of deciding this case on its merits, where a case involving the *T.L.O.* standard is unlikely to reach this Court in the near future because student searches cases are inherently circumstantial.

Not only can this Court clarify *T.L.O.*, it also could render a decision that gives direction to educators on how properly to apply the justified-at-inception and the reasonable-in-scope prongs established in that case. The Ninth Circuit misapplied *T.L.O.* when it blurred the line between these separate and distinct analyses. As enunciated in *T.L.O.*, the type of student misconduct at issue is only relevant to the nature-of-the-infraction factor under the second prong. The Court has the opportunity to clarify the two-step process for conducting reasonable searches.

This case also presents the opportunity for this Court to correct the Ninth Circuit's departure from a long line of decisions that accord a degree of deference to educators who administer our nation's schools. This tradition of deference animated the decisions in *T.L.O.*, *Acton*, and *Earls* and most recently was reaffirmed in *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). Deference to educators' judgments recognizes that the role of the courts in school administration should necessarily be limited in order to avoid placing unwise constraints on the ability of school officials to preserve the learning environment and protect the safety of students. Here, in contrast, the Ninth Circuit trivialized the

dangers posed by the non-medical use of prescription and over-the-counter ("OTC") drugs by students. *See Redding v. Safford Unified Sch. Dist. #1*, 531 F.3d 1071, 1085 (9th Cir. 2008) (suggesting that prescription grade ibuprofen does not pose "an imminent danger" to anyone). Recent reports, however, highlight a much more alarming trend with respect to prescription and OTC drug abuse—precisely the kind of trend to which educators are highly attuned.

Finally, the Ninth Circuit's misunderstanding and misapplication of *T.L.O.* all but predetermined its erroneous conclusion that the educator in this case was not entitled to qualified immunity because the law was clearly established at the time of the search. Not only is this conclusion wrong as a matter of law, but it also has the undesirable effect of holding educators personally liable for making decisions of constitutional import on which even experienced jurists cannot agree. This unfairly places educators in the position of being sued and held personally responsible for good faith decisions intended to protect the health and safety of the students entrusted to their care. This outcome demonstrates the critical need for clear guidance from this Court regarding the appropriate balance under the Fourth Amendment between the individual privacy rights accorded a particular student and the compelling interest of schools in maintaining a safe and healthy learning environment for all students.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS PUBLIC SCHOOL EDUCATORS TO CONDUCT REASONABLE SEARCHES OF STUDENTS.

A. The Court should decide the matter on its merits and provide clarification of the *T.L.O.* individualized suspicion standard.

Amici acknowledge and respect this Court's discretion not to render a decision on the merits where qualified immunity disposes of the case. The Court did, however, grant *certiorari* on both the merits and qualified immunity questions presented. Prior to oral argument, both parties and all *amici* will have fully briefed both questions. Further, as the leading organizations that assist educators in developing constitutionally and otherwise legally sound policy, *Amici* respectfully request this Court to provide public school educators with the interpretive guidance of the *T.L.O.* standard that has been lacking since the case was decided in 1985.

The decision in *T.L.O.* was instrumental in the development of the "special needs" doctrine, which recognizes that probable cause and warrant requirements are not required in all circumstances. 469 U.S. at 351 ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers"). Since *T.L.O.* was decided, this Court has recognized several other

circumstances where neither probable cause nor a warrant is necessary to conduct a reasonable search. *E.g., Acton*, 515 U.S. 646 (suspicionless urinalysis testing of student athletes is reasonable); *Earls*, 536 U.S. 822 (suspicionless urinalysis testing of students who participate in extracurricular activities is reasonable); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (blood and urinalysis testing of railroad employees without warrant or probable cause is reasonable); *Griffin v. Wis.*, 483 U.S. 868 (1987) (searches of probationer's home based on reasonable suspicion are reasonable). These decisions do not, however, provide interpretation of the *T.L.O.* standard. Even though *Acton* and *Earls* both involve student searches, the suspicionless drug testing standard is distinct from the reasonable suspicion standard from *T.L.O.* Therefore, lower courts are effectively limited to interpreting the *T.L.O.* standard through citation to *T.L.O.* and other lower court decisions.

In *T.L.O.*, this Court appropriately recognized that school officials responsible for maintaining safe and orderly learning environments need more flexibility than the probable cause standard under the Fourth Amendment generally permits. To provide this flexibility, the Court adopted a reasonable suspicion standard that accords deference to the judgments of school personnel in making risk assessments regarding the students suspected of violating school rules or the law. While this ruling thus eased the constitutional burdens on school leaders, the practical application of *T.L.O.* has led to confusion among both judges and educators.

The first prong of the *T.L.O.* test requires courts to assess whether the search was justified at

its inception. The lower courts' inconsistent application of this prong has resulted in the sending of mixed messages to educators as to how they must evaluate information about alleged student misconduct that raises health and safety concerns and determine an appropriate course of action. *Compare Williams v. Ellington*, 935 F.3d 881, 887-89 (6th Cir. 1991) (using the "quantity and quality" stop approach set forth in *Terry v. Ohio*, 392 U.S. 1 (1968)), to determine that student informant tips were comparable to anonymous informant tips and must be corroborated) *with C.B. v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996) (ruling that student informants are inherently more reliable than other informants because, if student informants provide inaccurate information, they are subject to discipline themselves). Here, the assistant principal received relevant information from both students and adults and knew of past incidents of student drug abuse that caused serious bodily harm. However, in the Ninth Circuit's estimation, the assistant principal did not have sufficient basis for conducting a search of the student's clothes to find the drugs students were reportedly planning to ingest hours later.

Another area of confusion arises from the justified-at-inception prong of the *T.L.O.* test as applied to searches with varying levels of privacy intrusion. Here, for example, the educators were looking for prescription pills—obviously a small item that could easily be concealed. Only after the initial minimally intrusive attempts turned up nothing did the search progress. Pursuant to the Ninth Circuit's decision, both educators and courts must continuously re-assess the propriety of the search, using the justified-at-inception analysis, whenever

the level of intrusion escalates during the search. *Redding*, 531 F.3d at 1081-85. Nothing in *T.L.O.* mandates a new level of inquiry under the justified-at-inception prong as the search progresses unless new evidence is found along the way.

The second part of the *T.L.O.* test, reasonable-in-scope, also has led to confusing and divergent guidance. When the objective of the search is to determine whether the student has concealed small items, especially items with potential for harm, then the search may need to be more intrusive to detect the items. The lower courts have recognized this practicality. *See, e.g.*, *Cornfield v. Consol. High Sch. Dist. No. 230*, 911 F.2d 1316, 1323 (7th Cir. 1993) (strip search to find drugs reasonable in scope where educators observed student undress from a distance and did not physically touch student); *Singleton v. Bd. of Educ. USD 500*, 894 F. Supp. 386, 388-89, 91 (D. Kan. 1995) (strip search to find stolen $150 reasonable in scope where educators did not require student to remove underwear and did not perform body cavity searches). The Ninth Circuit's opinion, however, rejects this recognition, broadly calling into question the ability of school officials to make all practical searches—both minimally intrusive and more intrusive. Without clarification of the reasonable-in-scope prong, educators will be hindered in their ability to enforce rules that prohibit possession of potentially dangerous, small items such as drugs.

The *T.L.O.* decision included analyzing the "nature of the infraction" as part of its framework for determining the constitutionality of school searches, but the *T.L.O.* Court explicitly declined to preclude certain infractions that some might regard as too

"trivial." 469 U.S. at 342 n.9 (stipulating that nature-of-the-infraction factor does not permit courts to alter reasonable suspicion standard because they believe some student misconduct to be trivial). The federal courts have provided scant guidance to educators regarding the application of the "nature of the infraction" factor. *See, e.g.*, *Cornfield*, 991 F.3d at 1320 (highly intrusive search in response to minor infraction unreasonable). The Ninth Circuit's application of this factor seems directly at odds with what the *T.L.O.* Court had in mind. Despite this Court's admonition to avoid second-guessing educators about the importance of particular school rules, the Ninth Circuit simply dismissed the importance of the educator's concerns for student safety here. That attitude colored the entire decision.

Unless the Court renders a decision on the merits of the first question presented in this case, *Amici* believe that the continuing confusion will have the practical effect of deterring educators from exercising their duty to prevent harm in the school environment. As it stands now in the Ninth Circuit, educators lack the guidance and flexibility they need to make on-the-ground judgments to protect student safety. Rather than being guided by judicial clarity, they are subject to judicial second-guessing pursuant to a confused standard.

The Court's decision on whether or not to decide this case on its merits comes at an interesting time, when it has just recently ended the order-of-battle experiment from *Saucier v. Katz*, 533 U.S. 194 (2001). *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (holding that whether to decide a case on its merits when it can be disposed of on basis of qualified immunity is purely discretionary on the

part of district courts and courts of appeals). This Court's decision in *Pearson* should not preclude a decision in this case, for two reasons. As an initial matter, the holding from *Pearson* applies only to district courts and courts of appeal, not this Court. *Id. Pearson* does not change the fact that this Court maintains discretionary jurisdiction over all cases for which it grants *certiorari*.

Even more compelling is that the relevant factors set forth in *Pearson* itself highly favor a decision on the merits in this case. *Pearson's* primary concern is judicial economy. This Court recognized that the order-of-battle requirement had the undesirable effect of creating irrelevant case law when the lower courts could have been directing their attention to cleaning up docket backlog. *See id.* at 818 ("The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."). Judicial economy should not be an issue at this stage in the proceedings of this case. While *Amici* acknowledge this Court's judicial restraint in seeking to answer only those questions that require answering, only this Court can provide the guidance necessary to ameliorate the abounding confusion regarding the application of *T.L.O.* Given the confusion among lower courts and the fact that nearly a quarter of a century has elapsed since this Court rendered a decision involving student searches based on reasonable suspicion, there can be no real argument that judicial economy dictates a decision here based merely on qualified immunity. *See id.* ("the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise

in cases in which a qualified immunity defense is unavailable"). The merits having been argued all the way to this Court, this case clearly exemplifies those "in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong." *Id.*

Amici reach this conclusion despite their agreement with the decision in *Pearson*—and despite the dramatically evident appropriateness of granting qualified immunity in this case. See *infra* at II. Regrettably, individual educators often are named in litigation. For these educators, the order-of-battle requirement was not only time-consuming but costly, as they were often forced to fund the briefing of the merits portion of the proceeding when the case could easily have been disposed of on qualified immunity grounds alone. *See id.* at 818 (encouraging lower courts to not decide cases on their merits if there is qualified immunity because the "[u]nnesessary litigation of constitutional issues also wastes the parties' resources."). *Amici* applaud the fact that lower court judges now have the option to dispose of a case based on qualified immunity without taking the time and money necessary to address the merits.[2] The flexibility afforded by *Pearson*, however, undoubtedly will retard the meaningful development of the *T.L.O.* standard by the lower courts that could have occurred were *Saucier* still in effect. *See id.* at 819 (suggesting that a lower court should not decide

[2] In fact, *Amici* believe it appropriate for this Court to identify specific types of cases, such as student search cases, where the circumstantial nature of the cases generally lends itself to the preferred disposal by qualified immunity without deciding the merits.

a case on its merits if qualified immunity is available and if it is a case "in which the constitutional question is so fact-bound that the decision provides little guidance for future cases"). The fact that the lower courts can easily dispose of student search cases on the basis of qualified immunity where each case is circumstantial is another reason this case provides the Court the perfect opportunity to further develop the *T.L.O.* standard.

B. The Ninth Circuit's decision on the merits should be reversed for misapplying the *T.L.O.* standard.

Petitioners' brief addresses many of the reasons why the Ninth Circuit improperly applied *T.L.O.* to the circumstances of this case, but *Amici* emphasize several points that are particularly troubling for educators and school boards generally. Although *Amici* focus much of their concern on the reasonable-in-scope prong of *T.L.O.*, a few issues regarding the justified-at-inception prong warrant attention.

1. The Court should clarify the justified-at-inception prong and, in doing so, correct the errors made by the Ninth Circuit.

The most disconcerting part of the Ninth Circuit's analysis of the justified-at-inception prong is its creation of a "sliding scale" requirement as to suspicion. The Ninth Circuit suggests that, as the intrusiveness of a search increases, educators will need a higher level of suspicion to conduct the

search. This is in direct conflict with *T.L.O.*'s holding that educators need only reasonable suspicion—nothing more—to conduct a student search. *See T.L.O.*, 469 U.S. at 341 (holding that educators need not strictly adhere "to the requirement that searches be based on probable cause"); *id.* at 341-42 (holding that "a search of a student by a teacher or other school official will be justified at its inception when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.") (emphasis added). To the extent that the Ninth Circuit now requires a level of suspicion higher than reasonable suspicion for some student searches to be justified at their inception, this Court should reaffirm the reasonable suspicion standard enunciated in *T.L.O.* and negate any suggestion that a sliding scale is to be used in the justified-at-inception inquiry. To emphasize Petitioners' argument, the issue that needs to be addressed in the first prong is not whether a *strip* search is justified at its inception, but whether a search is justified at its inception.

This case provides the opportunity for this Court to clear up the confusion because, unlike in *T.L.O.*, the educator in this case did not conduct two separate searches. *See T.L.O.*, 469 U.S. at 343-344 ("this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana."). In *T.L.O.*, two separate justified-at-inception inquiries were necessary because there were two separate searches looking for evidence of two different types of misconduct. *Id.* at 343-48. Here, the assistant principal was only

looking for evidence relating to the possession and distribution of prescription drugs. In cases such as this involving only one suspected type of misconduct, *Amici* submit that only one justified-at-inception inquiry is required. If an educator has reasonable suspicion that a student is involved in misconduct, then as long as she is looking for evidence of the original misconduct, she should not have to reconsider whether the degree of suspicion justifies each level of privacy intrusion. The proper analysis for determining the reasonableness of a progressive search under *T.L.O.* is the reasonable-in-scope prong.

By adopting a standard that increases the level of suspicion required of educators to perform more invasive searches, the Ninth Circuit has blurred the line between the justified-at-inception and the reasonable-in-scope prongs. These two prongs, as *T.L.O.* held, are separate and distinct. If an educator has reasonable suspicion to search a student, she is justified at the inception of the search. If there is no reasonable suspicion, the search should not occur. However, once the educator has reasonable suspicion, she need not reassess the level of suspicion when deciding whether the scope of the search is reasonable. As the Court held in *T.L.O.*, a search justified at its inception is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342. The level of suspicion is completely irrelevant to whether a search satisfies the reasonable-in-scope prong. As discussed below (see *infra* at I.B.2.), provided the search is designed to find the objects

sought and is not excessively intrusive based on the factors of age, sex, and the nature of the infraction, the search should be deemed reasonable in scope, with no reversion to the justified-at-inception prong and no repeat inquiry into the level of suspicion. Any other analysis is contrary to *T.L.O.*

Consider the confusion that the Ninth Circuit's sliding scale would have on other student searches. For example, what would be the proper justified-at-inception standard for a search of a female student where the objective of the search is to turn up evidence that she is selling ecstasy pills to other students? The student has a car, locker, desk, book bag, athletic bag, and a purse. Within the purse are numerous open and zippered pockets. Within the zippered pockets are wallets and smaller zippered bags. Within the book bag is a written journal, digital music player, cell phone, and digital camera. Within the athletic bag is a toiletries bag. The student herself is wearing three layers of clothing, a hat, socks, and shoes. Imagine how complicated it would be for an educator to follow the Ninth Circuit's progressive search analysis for each level of intrusion by considering each item examined to constitute a separate search and recalculating not only the reasonable scope of the search relative to its objectives and its intrusiveness in light of the student's age and sex and the nature of the infraction, but also the initial degree of suspicion. That is not and should not be the standard educators must follow.

This Court also may need to address the issue of student informants. How much can educators rely on student informants to determine whether a search is justified at its inception? Should educators

be held to the same standard as law enforcement in making informant assessments? Consistent with *T.L.O.*, *Amici* encourage this Court on this question not to hold educators to the same standard as law enforcement. Incorporating standards piecemeal from law enforcement case law will, no doubt, encourage lower courts to look to law enforcement doctrines to interpret the *T.L.O.* standard. That is exactly what this Court intended to avoid. 469 U.S. at 343 ("the [*T.L.O.*] standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense"). Rather, it would be reasonable to follow the approach of the Eleventh Circuit and determine that student informants are presumptively reliable enough for educators where a "student informant face[s] the possibility of disciplinary repercussions if the information [is] misleading." *See Driscoll*, 82 F.3d at 388.

2. This Court should clarify the reasonable-in-scope prong and, in particular, emphasize judicial deference to educator risk assessments made pursuant to the nature-of-the-infraction factor.

This Court can clarify the constitutional expectation of educators under *T.L.O.'s* reasonable-in-scope prong without inadvertently exposing students to more danger, needlessly complicating the law, or undermining the sensible judicial deference to educators.

First, under the objectives-of-the-search part of the reasonable-in-scope prong it would be reasonable for the Court to emphasize the need for educators, as occurred in this case, first to attempt to search less intrusively for the objective of the search. Although the exigencies of some extreme situations may not always permit the exhaustion of all less intrusive means of searching, educators should attempt to tailor their searches to start with less intrusive methods before escalating, where appropriate, to more intrusive methods.

Similarly, the age and gender factors as to intrusiveness were not explained in *T.L.O.* but could be here. For the gender factor, it would be presumptively unreasonable for an educator of one gender to perform an invasive search of a student of the opposite gender, particular one involving removal of other than outer clothing like coats and hats. As for the age factor, it is reasonable to require educators to restrict themselves to less invasive searches for younger students. With the age factor, there may also be the added consideration of the student's experience with privacy intrusions. *See Acton*, 515 U.S. at 655 (stating that student athletes have reduced expectation of privacy where they experience "suiting up" and communal undress).

Amici's primary concern regarding the Ninth Circuit's application of *T.L.O.* concerns the nature-of-the-infraction factor of intrusiveness. Although the type of student misconduct at issue should be irrelevant to the justified-at-inception inquiry, it is the focus of the nature-of-the-infraction factor. Generally speaking, the higher the potential danger of the alleged student misconduct, the more

deference courts should give educators regarding the scope of the search.

Amici do not suggest that educators are free from judicial oversight. Public schools are governmental entities, public school educators must comply with the Constitution, and a student search can be too intrusive for the Fourth Amendment to tolerate.

Here, however, the Ninth Circuit neglected to accord school officials the flexibility and deference this Court has deemed appropriate to address effectively the serious problem of student drug abuse. Instead, the Ninth Circuit unwisely substituted its own judgment that the threat of several students ingesting prescription strength drugs did not pose the necessary degree of harm to student health and welfare that would justify searching the student's person and clothing. This is in direct conflict with this Court's precedent.

T.L.O itself represents this Court's first recognition of the need to defer to school officials' efforts to combat drug abuse. "Maintaining order in the classroom has never been easy," the Court noted, "but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *T.L.O.*, 469 U.S. at 339. Because of this alarming trend, the Court appropriately acknowledged "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 340.

The Court continued this deferential approach in analyzing the constitutionality of the student drug

testing policies at issue in *Acton* and *Earls*. In *Acton*, this Court emphasized society's interest in combating student drug use. "That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's school-children is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs." *Acton*, 515 U.S. at 661. The Court explained that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* Discussing further the systemic problem of drug abuse as a rationale for deferring to educators' judgment about how to combat the problem, the Court wrote that "of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.* at 662. In *Earls*, the Court reiterated its view that deference to educators when combating drug abuse is appropriate in deciding the constitutionality of school searches. "The drug abuse problem among our Nation's youth has hardly abated since [*Acton*] was decided in 1995. In fact evidence suggests that it has only grown worse." *Earls*, 536 U.S. at 834. Nor has the concern abated since *Earls* was decided. In some ways, at least, it has grown worse. For example, the most recent data on female juvenile arrests reveals that drug related arrests have increased by 15 percent since 1997. Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006*, 3 (November 2008).

The Court most recently reaffirmed the need for deference in *Morse*. While *Morse* did not address a student search, the Court again noted the critical

importance of combating student drug use by stating "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S. Ct. at 2623. It would be a strange result indeed if the law allows educators to protect students from speech promoting drug use but unduly constrains them from actually attempting to find and confiscate the drugs themselves when there are reasonable grounds to believe drugs are present at school.

By failing to defer to educators when it substituted its own ideas of which drug threats are important and which are not, the Ninth Circuit has created the very atmosphere of turning the "judge's chambers into the principal's office" against which Justice Breyer warned in his concurring opinion in *Morse*:

> Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no

> one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

Id. at 2640 (Breyer, J., concurring).

Now more than ever, schools are in the forefront of addressing dangers to our youth, including their growing abuse of prescription drugs. The Office of National Drug Control Policy ("ONDCP") found in 2006 that, "more than 2.1 million teens abused prescription drugs." *Prescription for Danger: A Report on the Troubling Trend of Prescription and Over-the-Counter Drug Abuse Among the Nation's Teens* (Jan. 2008) ("ONDCP Report"). ONDCP Report at 2. Indeed, the report states that "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined." *Id.* at 1. Even more alarming, 12- to 13-year-olds indicate that prescription drugs are their drug of choice. *Id.* at 2. In a more recent report, the ONDCP stated that "2.5 million people aged 12 or older used prescription drugs non-medically for the first time. This means there are approximately 7,000 new prescription drugs abusers everyday." ONDCP, *The President's National Drug Control Strategy*, 11 (Jan. 2009). Most prescription drugs have "showed steady growth in use outside of their legitimate medical use through most of the 1990s....As a result, they have become a relatively more important part of the nation's drug abuse problem." Monitor The Future, *2008 Survey Results* ("MTF Report"), 4 (Dec. 11, 2008).

The ONDCP also identified teenaged girls as having a heightened risk for prescription drug

abuse. ONDCP, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007). ONDCP reported "that females are at particular risk for prescription drug abuse, with higher rates of abuse among teen girls, more emergency room visits among young women, and higher rates of treatment admissions for dependence on some prescription drugs among females." *Id.*

Further, and contrary to the Ninth Circuit's dismissal of any imminent danger, the ONDCP Report states that "[t]here has been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription and OTC drugs." *Id.* at 2. The National Institute on Drug Abuse ("NIDA") reports that abuse of prescription or OTC drugs can have a number of adverse physical and psychological effects, including impairing motor function, life-threatening respiratory and heart problems, hostility, paranoia, and depression. NIDA, *Prescription and Over-the-Counter Medications*, 2-7 (July 2008); NIDA August 2005 Report at 2-4. Unfortunately, prescription pain killers have been implicated in nearly 40 percent of the 22,400 annual drug overdose deaths most recently recorded. ONDCP, *The President's National Drug Control Strategy*, 12. This number is compared to the 17,000 deaths attributed to homicide in the same year. *Id.*

Because the Ninth Circuit did not view prescription strength versions of OTC drugs as an imminent threat, it discounted the educator's concern in this case. *See Redding* at 1086 ("We reject Safford's effort to lump together these run-of-the-mill anti-inflammatory pills with the evocative term

'prescription drugs,' in a knowing effort to shield an imprudent strip search of a young girl behind a larger war against drugs."). Not only is it unwise to exclude certain prescription drugs from discussion of prescription drug abuse, but even OTC drugs are being abused more and more. ONDCP Report at 3. OTC drug abuse is of particular concern "given the easy access teens have to these products." *Id.*

One major reason why schools are a natural battleground for the war against prescription and OTC drug abuse is the source of these drugs. More than half of surveyed high school seniors reported their source of prescription drugs "was getting them free from a friend or relative, followed closely by being sold the drugs by a friend or relative....Only about a fifth to a quarter of users of these drugs said that they had bought them from a dealer or stranger." MTF Report, 7, Table 14. "Clearly the informal networks of relatives and friends play a major role in the distribution of these prescription drugs to young users." *Id.* at 7 (internal citation omitted).

Responsible school administrators are well aware of the national trends in student drug abuse and are in a unique position to understand the substance abuse patterns in their own schools and communities, to take these problems seriously, and to use appropriate measures to respond on an educational as well as disciplinary level. But the message the Ninth Circuit's ruling sends is that prescription and OTC drug abuse is not significant enough a problem to warrant immediate intervention by school personnel who have reason to believe that students are planning to ingest drugs neither prescribed by a health care professional nor

provided by their parents. While public health authorities are calling loudly for increased awareness of this issue, the Ninth Circuit dismissed the concern as trifling, if not pretextual. The Ninth Circuit's refusal to accord appropriate deference to school officials makes the difficult job of protecting student health and welfare even harder.

This Court should provide more detailed guidance regarding the nature-of-the-infraction factor under the reasonable-in-scope prong. In doing so, it is prudent to follow precedent and consider recent studies by giving educators relatively more deference when the student misconduct at issue involves drugs.

Amici offer some suggestions for this Court as it further defines and interprets the nature-of-the-infraction factor. First and most important, this Court should clarify that the more a suspected student's conduct poses a potential safety risk on campus or at a school sponsored event, the more deference should be given to educators in making decisions about the appropriate scope of a search. Deference need not be abject, but this case demonstrates the problems that arise when a court strays too far from the deferential approach. That said, where the suspected student misconduct poses no potential safety concern, the Court may wish to indicate that a highly invasive search is presumptively unreasonable.

In addition, there should be no doubt that the unapproved use or distribution at school of drugs—whether illicit, prescription, or OTC—falls into the category of misconduct involving potential harm. The determination of whether a student's conduct poses a safety hazard should not incorporate the

benefit of hindsight. Nor should an educator be forced to research the harmful effects of certain substances before making a decision to conduct a search. While educators are especially well attuned to trends like drug abuse, they are neither pharmacists nor law enforcement officials and should not be expected to know precisely how certain drugs affect students, either alone or in combination with other substances.

The Court also may choose to include an analysis of the relationship between the nature-of-the-infraction factor and both the systemic and the local student safety problems. For example, the concerns over prescription and OTC drug usage have been experienced nationwide,[3] but the local problems

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[3] In addition to the information from the studies discussed *supra*, a cross section of recent publications provide evidence that prescription and OTC drug abuse among America's youth is neither isolated nor regionalized. *See, e.g.*, ConnectMidMichigan.com, *Midland cracks down on teen drug use* (Feb. 25, 2009) (Central Michigan); Des Moines Register, *Prescription drugs cited in south-side teen death* (Feb. 12, 2009) (Iowa); Colorado Springs Gazette, *Heroin investigation targets high school* (Dec. 16, 2008) (Colorado; major drug ring busted in affluent high school where prescriptions drugs were sold); Syracuse Post-Standard, *Teens' Abuse of Pills Worsens* (Nov. 6, 2008) (New York); Rocky Mountain News, *'Pharming' a growing fear—Some school districts are seeing a 'scary' increase in the dangerous trend of abusing prescription and over-the-counter pills* (Mar. 5, 2008) (Colorado); Times Leader, *Lyon students press for school drug testing* (Jan. 21, 2008) (Kentucky; noting "that five middle school students had overdosed on prescription drugs at school in the past two years"); Arkansas Leader, *Overdoses concern parent* (Dec. 17, 2007) (Arkansas); WSAZ NewsChannel 3, *High School Student Overdoses on Xanax* (Sep. 28, 2007) (Southern Ohio); Ventura County Star, *Drug mix may have killed teen in Ventura* (Apr. 13, 2007) (Southern California); Omaha World-Herald, *Prescription-drug*

may present unique dangers or create heightened awareness among local educators.

As a final note on the nature-of-the-infraction factor, it is important that the Court not misperceive this as a case where school boards and educators are seeking the Court's approval to develop policies and practices that encourage strip searches of students. Educators know that each situation is circumstantial, but without further clarity as to the *T.L.O.* intrusiveness factors, they are left in a position of making important on-the-spot judgments without knowing whether they will lose a lawsuit for searching for drugs or weapons. As this Court stated in *T.L.O.*, reason and common sense should dictate educator decisions and methods of searching their

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abuse is a growing problem among students (Mar. 15, 2007) (Nebraska); Daily Herald, *Kids taking drugs early and what they're using to get high may surprise you* (May 29, 2006) (Illinois); Orange County Register, *Campus overdose puts 3 in hospital—Fountain Valley High students are hospitalized* (Dec. 15, 2005) (Southern California); Dallas Morning News, *Destroyed by doping: Taylor's story, In the end, drugs' wrath proved stronger than he was* (June 5, 2005) (Texas); Sacramento Union, *Prescription Drug Overdose Sparks Fear* (May 18, 2005) (Northern California); Star Tribute, *No charges filed in teen's overdose on pain drug* (May 17, 2005) (Minnesota); Pittsburgh Post-Gazette, *Kids' abuse of over-the-counter cold medicine on the rise* (Mar. 21, 2005) (Pennsylvania); Washington Post, *Household Medicine Abused by The Young* (Oct. 8, 2004) (DC area); Arizona Republic, *Gilbert unites to fight teen drug use* (May 8, 2004) (Arizona); This Week, *Abuse of over-the-counter drugs posing danger for young users* (Jan. 22, 2004) (Central Ohio); USA Today, *Youths risk death in latest drug abuse trend* (Dec. 29, 2003) (Southern Florida); Detroit News, *Teen abuse of cold drug on the rise* (Mar. 14, 2002) (Southern Michigan); Sarasota Herald Tribune, *Teen's body found in ditch* (Dec. 24, 2000) (Central Florida; 13-year-old died after overdose of OTC drug).

students. *Amici* ask this Court to expound helpfully on the *T.L.O.* test.

II. UPHOLDING THE NINTH CIRCUIT'S DECISION REGARDING QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON EDUCATORS AND IMPLICATIONS FOR STUDENT SAFETY.

Amici recognize that student strip searches are rightly controversial and that reasonable minds will differ about what kinds of exigencies could warrant such a drastic, and rare, step in the school environment. Educators who must make quick decisions where student safety is concerned, however, should not be subject to personal liability because of the sensitivity and controversy of a measure. Educators like the assistant principal here should not be denied qualified immunity where their action was neither plainly incompetent nor in knowing violation of clearly established law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (government officials have qualified immunity unless their actions where plainly incompetent or in knowing violation of clearly established law).

The legal uncertainties surrounding student searches described above should preclude a finding of clearly established law necessary to deny a governmental official the protection of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Both this Court and the Ninth Circuit have held that, to overcome qualified immunity, the "specific contours of the law" must be well developed or "sufficiently clear that a reasonable official would understand that what he is doing violates [a

constitutional] right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations omitted); *Rudebuch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). This is a standard that "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 534 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201).

As noted *supra*, applying *T.L.O.* is no easy matter for an educator in an ongoing investigation of possible student misconduct. *See Beard v. Whitemore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (*T.L.O.* is not the kind of clear law necessary to clearly establish unlawfulness of student strip searches); *Ellington*, 936 F.2d at 886 (the *T.L.O.* test "has left courts later confronted with the issue either reluctant or unable to define what type of conduct would be subject to [§ 1983 liability]"). Prior to the decision in this case, the courts had not provided clear guidance to educators in the Ninth Circuit about the law on student strip searches. *T.L.O.*, the only individualized suspicion student search case decided by this Court, did not involve removal of student clothing, and while it established relevant factors to assess the constitutionality of school searches, it necessarily left to future courts the application of these factors to the unique circumstances of each case. There have been few federal court decisions applying *T.L.O.* to strip searches, and their results have been conflicting. Absent a declaration from this Court, clear law in the school administrator's own jurisdiction, or consistency among the circuits on strip searches, there can be no real argument that the specific contours of the law on strip searches of students were sufficiently clear so that the assistant principal

here reasonably should have known that his action violated the student's Fourth Amendment rights.

Based on *T.L.O.* and its progeny, it is clear to educators that, before they conduct a search, they must have reasonable suspicion that a search will likely turn up evidence that the student violated the law or a school rule. It is assuredly not clear, however, that it would be unconstitutional to proceed with a search at its inception where the search is based on information obtained from student informants in the context of both school-wide and student-specific drug and alcohol abuse. *See, e.g.*, *T.L.O.*, 469 U.S. at 337-48 (search justified at inception based on informants indicating student was smoking in the lavatory; second search justified at inception based on finding evidence of violation during first search); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823-28 (11th Cir. 1997) (search justified at inception where second grade student advised educator that someone stole his $7); *Driscoll*, 82 F.3d at 388 (search justified at inception where student informant advised educators that another student was going to sell drugs on campus); *Cornfield*, 991 F.2d at 1321-28 (search justified at inception where student had history of drug related offences and educators observed what appeared to be a male student "crotching" drugs); *Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-17 (M.D. Ala. 2003) (search not clearly unjustified at inception when, after drug sniffing dog alerted in library, drugs were found under table where student was sitting).

Further, while *T.L.O.* and its progeny also make clear to educators that a search must be reasonable in scope to find the objectives of the

search in light of the age and gender of the student and the nature of the infraction, under current case law, at least, it was not self-evidently unconstitutional to perform a strip search of a junior high female student to find prescription pills where: (a) prior to the search, educators searched the student's personal belongings; (b) the search was performed by two educators of the same gender as the student; (c) the educators never touched the student; and (d) the student was not required to remove her underwear. *See*, *e.g.*, *T.L.O.*, 469 U.S. at 337-48 (first search reasonable in scope because search of purse reasonable to find evidence of smoking; second search reasonable in scope because further search of purse reasonable to find evidence of possession and distribution of marijuana); *Jenkins*, 115 F.3d at 823-28 (strip search of second graders looking for stolen $7 not clearly unreasonable in scope where students were brought to the restroom to disrobe); *Cornfield*, 991 F.2d at 1321-28 (strip search reasonable in scope where educators suspected student to be "crotching" drugs, educators of the same gender searched by asking the student to remove his clothing and put on gym uniform, and no body cavity searches were performed); *Ellington*, 936 F.2d at 886-89 (strip search not clearly unreasonable in scope where educators trying to locate glass vial of drugs and educators first searched the student's purse and locker); *Rudolph*, 242 F. Supp. 2d at 1115-17 (nude search not clearly unreasonable in scope where educators looking for drugs); *Singleton*, 894 F. Supp at 390-91 (strip search reasonable in scope where search occurred in office with two educators of the same gender and student was not required to remove underwear).

Amici find it difficult to comprehend how the Ninth Circuit could subject an educator to personal liability for ordering a student search where even the judges reviewing the case could not agree whether the search was legal. Here the federal district court found the search to be constitutional, and a Ninth Circuit panel affirmed. Only on *en banc* review did the Ninth Circuit find the search unconstitutional, and then only by eight of eleven judges. This Court has already opined that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603 (1999).

Morse provides further instruction on the implications of judicial disagreement for qualified immunity determinations. Not a single justice in *Morse* expressed any doubt that the educator at issue was entitled to qualified immunity. *Morse*, 127 S. Ct. at 2638-43 (Breyer, J., concurring in part and dissenting in part) (arguing that the "Court need not and should not decide this rather difficult *First Amendment* issue on the merits" but "simply hold that qualified immunity bars the student's claim..."); *id.* at 2643 (Stevens, J., dissenting) ("I agree with the Court that the principal should not be held liable...."). Also, during oral argument, Justice Souter—who would have found the educator's actions in that case unconstitutional—suggested that the spirited oral argument about the merits of the case was strong evidence that the educator at issue was entitled to qualified immunity.[4] Chief

[4] Transcr. Of Oral Argument at 49-50, *Morse*, 127 S. Ct. 2618 ("JUSTICE SOUTER: We've been debating this in this courtroom for going over an hour, and it seems to me however

Justice Roberts and Justice Kennedy were even more direct in their opinion that the educator in *Morse* was certainly entitled to qualified immunity.[5]

Denying immunity to educators despite the lack of clarity over student searches will harm the more than 14,000 school districts, the 225,000 school administrators across the nation, and, ultimately, the millions of children they serve. If the Ninth Circuit's qualified immunity decision stands, it will create a chilling effect on educators who actively combat serious risks to student safety.

CONCLUSION

For these reasons, *Amici* urge the Court to: (a) decide this case on its merits to provide needed clarity; (b) rectify the errors made by the Ninth Circuit that seriously undermine school districts' efforts to address student drug abuse in an effective manner; and (c) at the very least, determine that the school official in this case should not be placed at personal legal risk for taking actions to safeguard the health and welfare of the students entrusted to his care.

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you come out, there is reasonable debate. Should the teacher have known, even in the[] calm deliberative atmosphere of the school later, what the correct answer is?").

[5] *Id.* at 29-30.

Respectfully submitted,

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